

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NADIA J. SALAMA

Claimant

VS.

HEN HOUSE MARKET

Respondent

AND

FOUR B CORPORATION

Insurance Carrier

Docket No. 1,009,525

ORDER

Respondent and its insurance carrier (respondent) request review of the March 28, 2008 Order on Motion to Dismiss Claim entered by Administrative Law Judge (ALJ) Robert H. Foerschler.

ISSUES

Respondent sought dismissal of claimant's claim pursuant to K.S.A. 44-523(f) asserting that claimant failed to take timely and appropriate action to resolve her claim. The ALJ denied respondent's request for a dismissal explaining that the "new section (f) to K.S.A. 44-523 was enacted in 2006 (session laws, Ch. 117). These are usually construed to have only a prospective effect, so the motion is denied at this point."¹

Respondent has appealed this Order asserting that under these facts, K.S.A. 44-523 should be applied retroactively and that "the ALJ had implicit authority to dismiss a claim for lack of prosecution, even without reliance on K.S.A. 44-523(f)."²

Claimant has filed no brief and is proceeding *pro se*.

¹ ALJ Order (Mar. 28, 2008).

² Respondent's Brief at 2 (filed May 1, 2008).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant alleges injuries to her hands and wrists while working for respondent and filed an Application for Hearing on March 11, 2003. She has undergone some treatment with Dr. Anne Rosenthal at respondent's direction. During the course of her treatment, respondent authorized surveillance and uncovered conduct it believed was wholly inconsistent with claimant's physical complaints and limitation of her activities. Moreover, respondent believed the surveillance strongly suggested that claimant's work activities with it were not the cause of her ongoing physical complaints. Since disclosure of that surveillance to Dr. Rosenthal, no further treatment has been provided or requested. And claimant's attorney withdrew from the claim leaving claimant unrepresented.

On March 18, 2008, respondent filed a Motion to Dismiss pursuant to K.S.A. 44-523(f) asserting that claimant has failed to prosecute her claim in a timely fashion and it should be dismissed. Respondent represents that there has been no action on this claim since 2004 and that the medical evidence supports respondent's contention that claimant's ongoing physical complaints do not relate to her work-related activities while in respondent's employ.

Respondent filed its Motion and provided claimant with a copy. But there is no indication within the file that would suggest that a hearing was held. An Order denying respondent's request was entered on March 28, 2008. The ALJ reasoned that even though 5 years had lapsed since claimant filed her claim, March 11, 2003, statutes are typically construed to have only prospective effect. And so he denied respondent's Motion.

Before the substantive issue can be addressed, the Board must consider whether it has jurisdiction at this juncture to consider the issue. This matter was simply bought on a motion to dismiss. The order appears to be interlocutory as it was entered during the pendency of the case.

Although the respondent's Motion and the ALJ's decision is an interlocutory decision and not a final decision, if the Board were not to take jurisdiction over the ALJ's decision at this juncture of the claim, then the legislative intent behind K.S.A. 44-523(f) would be emasculated. A denial of the respondent's request to dismiss means that the case must proceed to a final conclusion. That result would render the statutory process of achieving a dismissal without the time and expense of litigating as meaningless.³ For this reason,

³ To be clear, the Board has concerns about the constitutionality of K.S.A. 44-523(f). This statute has no provisions for basic due process. There is no requirement that notice be given nor is there an opportunity to be heard. The statute seems only to serve as a means for respondents and insurance carriers

the Board considers the ALJ's decision to deny respondent's request for a dismissal under K.S.A. 44-523(f) as a final decision and one that the Board has jurisdiction over based upon K.S.A. 44-551 (i)(1) and 44-555c(a).

Turning now to the merits of the respondent's argument, a majority of the Board concludes that the ALJ's decision to deny respondent's motion to dismiss should be affirmed.

The Kansas Legislature amended K.S.A. 44-523(f) effective July 1, 2006, to provide:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively especially when the amendment to an existing statute creates a new liability not existing before or changes the substantive rights of the parties.⁴ Moreover, it is an axiom of workers compensation law that the substantive rights between the parties are determined by the law in effect on the date of injury.⁵

The amendment to K.S.A. 2006 Supp. 44-523(f) does not express a clear intent that it is to operate retroactively and such an application of the statute could clearly affect claimant's substantive rights. The statutory amendment should be applied prospectively and accord all claims the same five-year period before they are subject to dismissal. Because the substantive rights of the parties to a workers compensation claim are determined by the law in effect on the date of injury the amendment to the statute applies to accidents that occur on or after its effective date. The Board affirms the ALJ's ruling.

to close their files on claims without a full and fair airing of the facts. It would seem that the purpose of the statute is to achieve some sort of dismissal docket. And if that is indeed the purpose then the Division should promulgate regulations that would meet the minimal requisites of due process in order to achieve the intended purpose of the statute.

⁴ *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

⁵ *Lyon v. Wilson*, 201 Kan. 768, 443 P.2d 314 (1968).

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the respondent and insurance carrier's appeal of the ALJ's Order on Motion to Dismiss Claim of Administrative Law Judge Robert H. Foerschler dated March 28, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING IN PART AND DISSENTING IN PART OPINION

The undersigned members concur in the majority's decision to accept jurisdiction but dissent as to the majority's decision to affirm the ALJ's denial of respondent's motion to dismiss pursuant to K.S.A. 44-523(f).

In *Owen Lumber Co.*⁶, the Kansas Supreme Court stated:

[W]hile the distinction between procedural, remedial, and substantive laws is an important part of the analysis and a distinction we continue to draw [citation omitted], our analysis does not end there. As stated by one commentator:

'[T]his formulation of the rule [that the legislature may modify the remedies for the assertion or enforcement of a right], in addition to ignoring the other factors relevant in determining the constitutionality of a particular statute, is an oversimplification of the manner in which the [United States Supreme] Court weighs a statute's effect on previously acquired rights. The Court has recognized that the

⁶ *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 223, 73 P.3d 753 (2003) (citing *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 364-65, 892 P.2d 497 [1995] and quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]).

removal of all or a substantial part of the remedies for enforcing a private contract may have the same practical effect as an explicit denial of the right. Thus the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.'

Under certain circumstances, K.S.A. 2006 Supp. 44-523(f) could affect the substantive rights of a claimant if applied retroactively and, therefore, it is not a procedural amendment only. But in those cases where the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute the claim, the statute's effect may not be procedural as to that claim and the amendment could be applied retroactively.

The new subsection would affect a claimant's substantive rights if its dismissal provision was applied in a case where the time limit ran before the subsection became effective, thus "blindsiding" the claimant with a dismissal. Conversely, if the five-year period had not expired by the time the statute took effect the claimant may have time to proceed to final hearing or show good cause for an extension of time. Under such circumstances the claimant should have a reasonable opportunity to comply with the new subsection's procedural requirement before it is given retroactive application. The test is what constitutes a reasonable time from the effective date of the amendment until the five-year period expires. In addition, there was also a period of time from the date the Legislature enacted the amendment to K.S.A. 44-523 until it became effective. This should also alert counsel to the need to prosecute a claim and be factored in to the determination of what constitutes a reasonable time.

The date upon which K.S.A. 44-523(f) operates is not the date the application for hearing was filed, but five years after that date. The statute should not operate retroactively if it is applied to an application's "fifth anniversary" date that fell before the statute became effective. But in those cases where the application's fifth anniversary falls after the effective date of the statute, the statute may be applied with retroactive effect where it is reasonable to do so. If a fifth anniversary fell after, but very near the statute's effective date, such that the claimant had no reasonable chance to comply, fairness may require some "grace period."

The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to

dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue her rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.

Under these facts, the effective date of the statute was July 1, 2006. The 5th anniversary of her Application for Hearing did not occur until almost two years later, on March 17, 2008. Thus, under the minority's view, it is reasonable to apply the statute retroactively in this case. Although a dismissal without notice is a troubling procedure, that is the procedure the Legislature has enacted and it should be applied in this case.

BOARD MEMBER

BOARD MEMBER

c: Nadia J. Salama, Pro Se Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge